IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JEANNETTE MALASCALZA,	)	
	)	
Petitioner Below/Appellant,	)	
	)	
v.	)	Civil Action No: CPU4-10-004764
	)	
	)	
JENNIFER K. COHAN, DIRECTOR, DIVISION OF MOTOR VEHICLES,	)	
	)	
	)	
Defendant Below/Appellee.	)	

Submitted: November 30, 2010
Decided: February 17, 2011

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APPEAL FROM DIVISION OF MOTOR VEHICLES - AFFIRMED

Jeannette Malascalza, Petitioner-Below/Appellant (hereinafter "Malascalza") brings this appeal from a decision of the Division of Motor Vehicles (hereinafter "DMV"), dated June 23, 2010 revoking her license for failure to submit to a chemical test, pursuant to 21 *Del. C.* 2742(b).[1]

[1] "Section 2740 requires a driver to submit to a chemical test for the presence of alcohol or drugs whenever a police officer has probable cause to believe that the driver is operating his vehicle under the influence of alcohol or drugs. If the officer, having such probable cause, requests the driver to take the test and the driver refuses to submit to such test, the driver's license may be revoked. 21 *Del.C.* § 2742(b). Where the license revocation was based on the

The hearing officer concluded that there was probable cause to believe that Malascalza appeared to be in violation of 21 Del. C. § 4177. The hearing officer further concluded that Malascalza refused to submit to an intoxilyzer test after being informed of the penalty of revocation for such refusal, following a hearing held on June 22, 2010.

FACTS

On January 22, 2010, Corporal Todd Dukes (hereinafter "Officer Dukes") of the Delaware State Police Troop Number 2, so employed since 2005, was seated in his marked patrol vehicle in the rear parking lot of Troop 2 when he heard a loud noise. Officer Dukes, looking out his vehicle's front windshield, observed a single vehicle driving on Route 40. Officer Dukes testified he did not observe any other vehicles in the area at the time. Officer Dukes observed that the noise grew louder as the vehicle approached and then began to diminish as the vehicle left. Officer Dukes proceeded to follow the vehicle East on Route 40 to determine the sourced of noise. Officer Dukes followed the vehicle at approximately at three or four car lengths with no intervening vehicle between, and observed that there was damage to the front tire of the vehicle. Officer Dukes testified the tire was attached to the steering mechanism of the vehicle. Officer Dukes testified that he did not note the speed at which the vehicle was traveling but stated that it would be fair to say that the vehicle was not exceeding the speed limit.

Officer Dukes activated his emergency lights and sirens; however, the vehicle did not stop but rather continued driving on Route 40, turned right onto Delaware 72, and then turned right onto Fox Run Circle. Officer Dukes testified that he estimated the distance from Troop 2 to the Route 72 intersection was approximately three-tenths of a mile. Officer Dukes testified that

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driver's refusal to take the test, it was not necessary to establish that the driver was under the influence of alcohol. 21 *Del.C.* § 2742(b) and (f)." *Wilson v. Division of Motor Vehicles*, 1988 WL 15304 at *1 (Del. Super. Ct. Jan. 28, 1988).

the vehicle had both its headlights and taillights on but he did not recall whether the vehicle remained in the right lane the entire period prior to turning. Officer Dukes further testified when making a right turn onto Route 72 from Route 40, the vehicle entered the designated right-turn lane prior to making the right-hand turn. Officer Dukes testified that there was nothing noteworthy or erratic about the manner in which the vehicle made the right-hand turn, but did not recall if the operator used the right-turn signal. Officer Dukes testified that once the vehicle made the right turn, the vehicle parked on the asphalt, blocking the flow of traffic exiting the apartment complex; however, he further stated that there was no shoulder on that particular roadway. Officer Dukes did not recall any erratic driving, difficulty with the right turn, and that the vehicle stopped in any eventful manner. Officer Dukes contacted the driver and sole occupant of the vehicle, Malascalza.

Officer Dukes testified that Malascalza asked him why he had stopped her and he informed her that she had been driving on the wheel rim since passing Troop 2. Officer Dukes then asked her if she recalled hitting anything, to which Malascalza responded that she did not recall. Officer Dukes testified at the hearing that while speaking with Malascalza, he detected an odor of alcohol and her eyes were glassy. Officer Dukes was using a passive alcohol sensor, which is built into a flashlight to detect the presence of alcohol. Officer Dukes testified at the hearing that the sensor indicated a strong presence of alcohol. Officer Dukes testified that when asked, Malascalza stated she was coming from Newark, and she had consumed three glasses of wine. Malascalza informed Officer Dukes that she was going to drive home regardless of the flat tire at which time she began to put the car in drive. Officer Dukes convinced Malascalza to put the car back into park and turn off the engine. Officer Dukes asked Malascalza for her driver's license, registration and insurance. Malascalza asked Officer Dukes again why he stopped her,

to which he responded that she had a flat tire. Officer Dukes did not recall where Malascalza retrieved her documents, but they were provided, however, he testified at the hearing Malascalza fumbled through her paperwork on her lap.

Officer Dukes asked Malascalza to step out of the vehicle and submit to field sobriety tests, which she agreed. Officer Dukes administered the alphabet test, counting test, walk and turn test, one leg stand test, and a Portable Breath Test (PBT). Officer Dukes testified that the alphabet recitation and the counting backwards are not National Highway Traffic Safety Administration ("NHTSA") - approved tests.

In administering the alphabet test, Officer Dukes testified that he asked Malascalza to recite the letters "D" through "P" in order. Malascalza stated "D, F, G, K, C, D, H, I, J, K, P, R, S, T, U, V" and then stopped. On the counting test, Officer Dukes testified that he asked Malascalza to count backwards starting at "76" and stopping at "59". Malascalza stated "76, um 76, um I can't, 76, uh, 75" and then stopped.

In administering the walk and turn test, Officer Dukes testified "I instructed her and explained to her multiple times while the test was being -- first prior to administering and during the administration of the test" In performing the test, Officer Dukes testified Malascalza during the first nine steps, missed her heel to toe on the second, third, fourth, fifth, sixth, seventh, eighth and ninth steps; and stepped off the line on the third, fourth, fifth, sixth, seventh, eighth and ninth steps. In addition, Malascalza raised her arms on the fourth, fifth, seventh, and eight steps and took ten steps. On the return steps, Malascalza missed heel to toe on the second, third, fourth, fifth and sixth steps; she also raised her arms on the second, third, fourth and fifth steps; and took only six steps.

When performing the one leg stand test, Officer Dukes testified, "during the first ten seconds of the test, after being explained how to conduct the test," she raised her arms on the third, sixth, and seventh, second[s]; and placed her foot down on the fifth and tenth. On the eleventh through twentieth seconds, she raised her arms on the eleventh, twelfth and thirteenth [seconds] and put her foot down on the fifteenth [seconds]." Officer Dukes testified he stopped the test at the fifteenth second because Malascalza could no longer raise her foot without holding onto her car. Further, Officer Dukes testified, "Malascalza was unable to point out her toe as he had instructed her at the beginning of the test."

Officer Dukes administered a Preliminary Breath Test ("PBT"), and testified the results were a .30.[2]

Based upon Malascalza's performance on the field coordination tests and the results of the PBT test, Officer Dukes placed her under arrest for Driving Under the Influence of Alcohol

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[2] In the record, the results of the PBT were admitted over objection by defense counsel. The response of the Hearing Officer to defense counsel's objection was "Okay. I will talk to you later." The Hearing Officer's Decision noted a Fail on the PBT. Defense counsel submits to this Court that the Hearing Officer's failure to rule upon the objection constitutes an error of law. However, an administrative hearing need not observe all the procedures and formalities of a court action. *See In The Matter of Charles J. Sweeney,* 257 A.2d 764, 765 (Del. Super. Ct. 1969); *Morris v. Shahan*, 1993 WL 141861 at *2 (Del. Super. Ct. Apr. 8, 1993) ("although there is no statutory authority for the proposition, it is generally accepted in Delaware that strict adherence to the rules of evidence is not required in administrative proceedings."); *Morris v. Shahan*, 1993 WL 141861 at *2 (Del. Super. Ct. Apr. 8, 1993) citing *See, e.g., In The Matter of Charles J. Sweeney,* 257 A.2d 764, 765 (Del. Super. Ct. 1969) ("'A suspension or revocation hearing before the Commissioner need not have all the procedures and formalities of a court action in order to meet the requirements of due process, but a defendant has the right to be confronted by his accuser'- refusing to permit police officer's report to be admitted into evidence when officer not present"); *Saxton v. Voshell,* C.A. No. 90A-JN-12, Toliver, J. (Del. Super. Ct. April 9, 1991) (citing *Sweeney,* 257 A.2d at 765 "for the proposition that in revocation proceedings 'strict adherence to the Delaware Rules of Evidence [is] unnecessary'- permitting officer who did not perform the calibration tests on an intoxilyzer machine to admit the results into evidence"); *Reams v. Division of Motor Vehicles,* C.A. No. 90A-09-12, Goldstein, J. (Del. Super. Ct. Feb. 28, 1991) ("'the DMV is not bound by the Delaware Rules of Evidence'- but holding that it was within the hearing officer's discretion to refuse to admit the officer's recollection of intoxilyzer test results without the evidence card he recorded them on"). *Morris v. Shahan*, 1993 WL 141861 at *2 (Del. Super. Ct. Apr. 8, 1993).

Baker v. Hospital Billing & Collection Service, Ltd., 2003 WL 21538020 at * 3 (Del. Super. Ct. Apr. 30, 2003) citing *Ridings v. UIAB,* 407 A.2d 238, 240 (Del. Super. Ct.1979) ; *Henson v. Div. Of Motor Vehicles,* 1993 WL 331105 at *2 (Del. Super. Ct. July 19, 1993) ("Administrative boards are not constrained by the rigid evidentiary rules which govern jury trials, but should hear all evidence which could conceivably throw light on the controversy.").

("DUI"). Malascalza was transported to the Delaware State Police Troop 2 for processing. Upon arrival at the Troop, Officer Dukes testified; "Malascalza appeared to have soiled herself. Her pants were extremely wet in an area only associated with someone urinating themselves." Officer Dukes asked Malascalza to sit on a wood bench at Troop 2 and, in doing so, Malascalza fell onto the floor. Officer Dukes testified, "The floor was dry and level and that there was nothing hazardous about the floor." After the conclusion of the twenty minute observation period, Officer Dukes asked Malascalza to consent to an intoxilyzer test, to which she refused. Officer Dukes testified he read Malascalza the implied consent provision stating he had reason to believe she had violated 21 *Del. C. § 4177*, and asked if she would submit to the breathalyzer. Malascalza replied that she would not and asked to speak with her attorney. Malascalza was given permission to use the telephone at the Troop to call someone, but was unable to reach anyone. Officer Dukes testified that he read the paragraph to Malascalza a second time and Malascalza interrupted Officer Dukes during the reading informing him that she wanted to call her lawyer. Officer Dukes began to read the paragraph again, advising Malascalza that if her attorney did not answer the telephone the first time, he probably would not answer a second call.

Officer Dukes testified that he read the paragraph a third time and asked Malascalza to submit to the breath test. Officer Dukes testified that Malascalza refused again and when Officer Dukes asked her why she refused to take the test, Malascalza responded that she was unable to contact her lawyer and she did not know what to do. She was asked to sign the implied consent form which stated she had the paragraph read to her and refused to submit to the test. Malascalza wrote her name on the driver's signature line of the form and was issued a citation.

On June 22, 2010, Malascalza appeared at the DMV for a hearing pursuant to 21 Del. C. § 2742. On June 23, 2010, the hearing officer issued an opinion holding that Officer Dukes had

probable cause to take Malascalza into custody and require that she submit to the intoxilyzer test. The hearing officer further revoked Malascalza's license for 18 months for refusing to submit to a chemical test pursuant to 21 *Del. C*. § 2742 (b).

STANDARD OF REVIEW

The standard of review of an appeal from an administrative decision of the DMV is on the record, and, as such, is limited to correcting errors of law and determining whether substantial evidence exists to support the hearing officer's factual findings and conclusions of law.[3] Therefore, the decision will stand unless the Court finds the hearing officer's findings are not supported by substantial evidence in the record or is "not the product of an orderly and logical deductive process."[4]

If substantial evidence exists in the record below, this Court "may not re-weigh and substitute its own judgment for that of the Division of Motor Vehicle."[5] However, "when the facts have been established, the hearing officer's evaluation of their legal significance may be scrutinized upon appeal."[6] However, "the Division's understanding of what transpired is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence."[7]

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[3] *Lundin v. Cohan*, 2009 WL 188001 at *2 (Del. Com. Pl. Jan. 28, 2009) citing *Shahan v. Landing*, 632 A.2d 1357 (Del. 1994); *See also Howard v. Voshell*, 621 A.2d 804 (Del. 1992); *Eskridge v. Voshell*, 593 A.2d 589 (Del. 1991).
[4] *Lundin* at *2 citing *Quaker Hill Place v. State Human Relations*, 498 A.2d 175 (Del. Super. Ct. 1985).
[5] *Wayne v. Division of Motor Vehicles*, 2004 WL 326926 at *1 (Del. Com. Pl. Jan. 22, 2004) citing *Barnett v. Division of Motor Vehicles*, 514 A.2d 1145 (Del. Super. Ct. 1986); *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. Ct. 1976).
[6] *Voshell v. Addix*, 574 A.2d 264 (Table) (Del. 1990); 1990 WL 40028 at *2 (Del.).
[7] *Id*.

OPINION

In this appeal, Malascalza contends Officer Dukes did not have reasonable articulable suspicion to justify the stop and probable cause to justify her arrest for driving while under the influence of alcohol. She does not dispute a chemical test was requested and refused.

An officer has a reasonable suspicion to justify a stop when he is able "to point to specific and articulable facts which when taken together with rational inferences from those facts, reasonably warrant the intrusion."[8] The analysis is based upon subjective evaluation of the facts the officer had at the time of the stop, measured by an objective evaluation of whether a reasonable officer with similar facts would be warranted in taking such action. In this instance, the Officer heard a very loud noise which he determined was coming from Malascalza's vehicle. Upon investigation, he determined that the left front tire of Malascalza's vehicle was flat, and she was driving on the vehicle rim.

When Officer Dukes confirmed the noise was coming from a flat tire, it was reasonable for him to stop the vehicle for further inquiry. Operating a vehicle on a public roadway on the rim is an unsafe condition, especially where, as it here, it is one of the wheels attached to the steering mechanism. The provisions of 21 *Del. C. §* 4355 provide driving a vehicle in an unsafe condition as to endanger any person or is not at all times equipped with equipment in proper condition, is a violation. Therefore, I find the Officer had sufficient basis to stop the vehicle.

Secondly, Malascalza argues the Hearing Officer's decision must be reversed because the Officer lacked probable cause to arrest her on suspicion of Driving While Under the Influence of Alcohol and transporting her to the Police Troop In order to establish probable cause, the arresting officer is required to have facts, which, when viewed under the totality of the

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[8] *Coleman v. State*, 562 A.2d 1171, 1174 (Del. Super. Ct. 1989).

circumstances, support a finding that there is a fair probability that the person to be arrested committed a crime, for which such person is to be taken into custody.[9] Stated differently, probable cause to arrest exists if the totality of the circumstances as viewed by a reasonable police officer in light of his training and experience leads him to believe that a crime has been committed.[10]

Further, "in cases in which a defendant is suspected of, and charged with, Driving Under the Influence of Alcohol, the police must present evidence that, under the totality of the circumstances, there is a fair probability that the defendant was driving a vehicle while under the influence of alcohol."[11] [T]he possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest."[12]

The facts here indicate, after being stopped, Officer Dukes detected an odor of alcohol and observed Malascalza's eyes were glassy. When asked, Malascalza stated she had been drinking and had consumed three (3) glasses of wine. Thereafter, the Officer administered a series of field coordination tests to determine if Malascalza was impaired.

The record indicates Officer Dukes administered five field tests. This Court has previously concluded that the Alphabet test and the Counting test is of little value for three reasons. First, these are not test approved by NISTA. Secondly, there is no standard by which the Court can measure the defendant's performance on such test. Thirdly, and most importantly, there is no evidence that NISTA has provided which concludes there is a correlation between

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[9] *Soukup v. Division of Motor Vehicles*, 2008 WL 2332723 at *2 citing *State v. Maxwell*, 624 A.2d 926 (Del. Super. Ct. 1993)
[10] *Soukup* at *2 citing *Beck v. Ohio*, 379 U.S. 89 (1964).
[11] *State v. Ministero*, 2006 WL 3844201 at *2 (Del. Super. Ct. Dec. 21, 2006) citing *State v. Maxwell*, 624 A.2d 926, 930 (citing *Jarvis v. State*, 600 A.2d 38, 43 (Del. Super. Ct. 1991)).
[12] *State v. Maxwell*, 624 A.2d 926, 929-30 (Del. 1993).

performance on these tests and impairment. Therefore, I find no basis to consider these tests and decline to give them any value in reviewing the hearing officer's decision.

Officer Dukes administered three NISTA approved tests. The first was the Walk-and-Turn test. On this test, Malascalza took additional steps, missed her heel to toe on eight (8) steps and stepped off the line on six (6) steps; and further raised her arms on four (4) steps. On the return nine (9) steps of the test, Malascalza missed heel to toe on five (5) steps and raised her arms on four (4) steps. On the Balance Test, Malascalza raised her arms at the count of two, three, six, seven, eleven, twelve and thirteen, and placed her foot down at the count of five, ten and fifteen. Officer Dukes terminated the test at the count of fifteen because Malascalza could no longer raise her foot without holding onto her vehicle. Further, Officer Dukes observed Malascalza was unable to point out her toe as he had instructed her at the beginning of the test.

The facts which the officer testified at the hearing consist of his evaluation of defendant's physical appearance, odor of alcohol, failure to stop after he activated his signal, driving on a flat tire and his evaluation of Malascalza's performance on the field sobriety tests. This Court has previously addressed this issue of the test evaluation issue in *Soukup* where it held:

> "the evaluation of one's performance on such tests, in part, rest[s] upon the conditions they were administered, whether such test[s] are approved by NHTSA, the officer's education and experience, and [the] defendant's physical ability to perform such test absent the presence of alcohol. While perfect performance is what one may find admirable, such is not realistic given the environment under [which] such tests are administered. Therefore, in measuring one's performance, a more realistic approach is reasonable performance taking into account NHTSA objectives, the conditions prevailing and any other adverse conditions."[13]

Malascalza's performance on the sobriety tests failed to meet an acceptable level, when applying the *Soukup* Standard. When the test results are considered with detection of alcoholic

[13] *Soukup v. Division of Motor Vehicles*, 2008 WL 2332723 at *3, Del. Com. Pl. June 5, 2008.

beverage, admission of consumption, failure to stop after the signal was activated, and driving with a flat tire, such facts are sufficient to lead a reasonable officer to conclude that Malascalza was operating her vehicle while under the influence of alcohol, and should be taken for further testing.[14]

The facts set forth in the record which support the determination of the Hearing Officer are: (1) driving on a flat front tire, (2) ignoring the officer's signals to pull over, (3) when informed by the officer that she had a flat tire, appellant informed the officer that it was okay and that she would continue driving home on the flat tire, (4) appellant attempted to drive away after the stop, (5) odor of alcoholic beverage coming from appellant's vehicle, (6) appellant's glassy eyes, (7) appellant's admission of consumption of alcoholic beverages, (8) appellant's performance on the walk and turn test, and (9) appellant's performance on the one leg stand test.

However, Malascalza contends that the walk and turn test and the one leg stand test should not have been considered in the determination of probable cause due to Officer Dukes' failure to inquiry of Malascalza if she had a physical impairment which would prevent her from performing the test or reduce her performance on such tests. The Superior Court in *State v. King*[15] and revisited in *State v. Ministero*[16] addressed a similar issue of validity of field tests in the conjunction with physical impairment. The Court stated:

> "In *Ministero*, this Court affirmed a Court of Common Pleas ("CCP") decision that insufficient probable cause to arrest the defendant for driving under the influence. This Court stated that in order to determine whether the physical field tests conducted by the investigating officer (the walk and turn and one leg stand tests) were reliable and therefore admissible, the (lower) Court had to

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[14] *See Price v. Voshell*, 1991 WL 89866 at *4 (Del. Super. Ct. May 10, 1991) ("Thus, while the prohibition on the use of the PBT as a determinant on the issue of guilt constitutes current law, no such prohibition has been expressed as to its use as an indicium of probable cause." In *Price*, the Court held that the hearing officer was justified in using the PBT in determining probable cause.).

[15] *State v. King*, 2007 WL 1153058 (Del. Super. Ct. April 3, 2007).

[16] *State v. Ministero*, 2006 WL 3844201 (Del. Super. Ct. Dec. 21, 2006).

> first determine if the field tests conducted by the Officer were conducted in accordance with the NHTSA standards.
> The CCP found that the Officer failed to comply with the NHTSA guidelines, indicating that where there is an indication of some physical disability, the test is not to be performed. The record below evidenced that the defendant informed the trooper prior to the tests that he had surgery on his neck and back. This Court decided not to question the Court of Common Pleas exclusion of the field tests since the defendant had advised the trooper of his previous back surgery."[17]

Case law[18] indicates that a Court is free to disregard the physical field sobriety tests when assessing whether probable cause existed to arrest an individual if the individual advised the officer of a physical impairment prior to the tests.[19] However, here there is no evidence in the record to indicate Officer Dukes was informed of Malascalza's physical impairment or if she had any other physical difficulty to performing the physical field tests. Even assuming, *arguendo*, this Court were to not consider the results of the walk and turn test and the one leg stand as Malascalza contends there still exists sufficient facts in the record to support a finding of probable cause, based upon the odor, glassy eyes, driving on the vehicle rim, failure to stop at police signal, admission of drinking, and attempting to drive after the stop.

In regard to the use of the flashlight equipped with a passive alcohol sensor, the Hearing Officer considered the strong reading from the passive alcohol sensor in the probable cause analysis. However, there is no data that the use of a passive alcohol sensor is valid or scientifically reliable. Moreover, no court in this state has considered the matter on its merits.

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[17] *King* at *3.
[18] *State v. Ministero*, 2006 WL 3844201 (Del. Super. Ct. Dec. 21, 2006); *State v. King*, 2007 WL 1153058 (Del. Super. Ct. April 3, 2007).
[19] *See State v. King* at *6 ("…because the field tests were not conducted within the NHTSA guidelines, the CCP was free to disregard them when assessing if probable cause existed to arrest the defendant in the *Ministero* case. Obviously, there had to have been testimony concerning the procedure followed in conducting the tests.
The Officer may be examined as to describing the procedure and his observations, however, since the tests have not been accepted as scientifically valid in Delaware, the Officer may be examined as a lay witness as to his methods and observations as well as whether he followed a recognized standard of procedure.").

However, I conclude that even disregarding this evidence, there still exist sufficient facts in the record to support the Hearing Officer's conclusion that Officer Dukes had probable cause to believe Malascalza was driving under the influence of alcohol, and required her to submit to further testing.[20]

Consequently, I conclude that the hearing officer's decision revoking Malascalza's license is supported by substantial evidence and applicable law and is hereby AFFIRMED.

SO ORDERED this 17th day of February 2011

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Alex J. Smalls
Chief Judge

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[20] "21 *Del.C.* § 4177(a) forbids a person from operating a motor vehicle 'while under the influence of alcohol or of any drug.' Under 21 *Del.C.* § 2742(c), the Division may revoke the driving privileges of any person found to have violated 21 *Del. C.§4177(a)* However, before this administrative action may be taken, the Division must establish both that the police had probable cause to believe that a violation had occurred and that such a violation was established by a preponderance of the evidence. *Id.* § 2742(f)." *Voshell v. Addix*, 574 A.2d 264 (Table) (Del. 1990), 1990 WL 40028 at *2 (Del.).